



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lieutenant Colonel Richard H. Johnson, USAF
(Retired)

File: B-252058

Date: May 12, 1993

DIGEST

Retired member of the Air Force elected participation in Survivor Benefit Plan for spouse and child. Deductions from his retired pay were correctly made for 1 year. Retired pay was then stopped due to erroneous report of his death but was reinstated 19 days later. However, when retired pay was reinstated, SBP deductions were not resumed, again as the result of an administrative error. Member received earnings statements with his retired pay for 10 years which showed no SBP deductions, while member's beneficiaries received the benefit of continuous SBP coverage. Because member should have been aware deductions were not being made, he is not without "fault" in the matter, even though member was unaware of the overpayments, and waiver may not be granted.

DECISION

This action is in response to a request from Lieutenant Colonel Richard H. Johnson, USAF (Retired), for reconsideration of our Claims Group's denial of waiver of his debt of \$8000.18 which arose because Survivor Benefit Plan deductions were not taken from his retired pay for 10 and a half years. We affirm the Claims Group's denial of waiver for the reasons set forth below.

Lieutenant Colonel Johnson retired on December 31, 1978, and elected spouse and dependent coverage under the Survivor Benefit Plan (SBP). Appropriate deductions were made from his retired pay from January 1, 1979, to December 31, 1979. His retired pay statements reflected those deductions.

At that time, Lieutenant Colonel Johnson had an allotment deduction sent to his mother, who died in 1979. The allotment checks which had been mailed to her for November and December 1979 after her death had been returned to Defense Finance and Accounting Service (DFAS), Denver Center. However, due to administrative error, an erroneous entry noted that Lieutenant Colonel Johnson had died. On January 3, 1980, his retired pay account was suspended. It was reactivated effective January 21, 1980; however, as a

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result of a further error, the SBP deductions from his retired pay were not resumed. Thus, from January 1, 1980, through July 31, 1991, no SBP deductions were taken from his retired pay, causing an overpayment of \$8000.18.

Lieutenant Colonel Johnson's request for waiver was denied by DFAS. He appealed that determination. Our Claims Group, by settlement dated April 30, 1992, also denied waiver, holding that since Lieutenant Colonel Johnson received pay statements throughout those years which clearly showed that the SBP deduction was not being made from his retired pay waiver could not be allowed.

In his request for reconsideration Lieutenant Colonel Johnson has stated that he did not realize that the SBP deduction had been stopped due to the fact that the allotment to his mother had ended at approximately the same time. He further states that since the overpayment was due to the government's error, rather than his own, he believes the debt should be waived.

As noted by the Claims Group, 10 U.S.C. § 2774 provides the authority for waiving claims for erroneous payments of pay and allowances made to or on behalf of members or former members of the uniformed services if collection would be against equity and good conscience and not in the best interest of the United States. Generally these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

The word "fault" as used in section 2774 has been interpreted by this Office as including more than a proven overt act or omission by the member. Thus, "fault" is considered to exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. Under circumstances where a member has received an unexplained increase in pay we have long held that a reasonable person would make inquiries regarding the increase and take action to have the matter corrected. Brian P. Happy, B-214932, May 29, 1984.

In the present case, we note that the record shows that an allotment of \$100 was being made to Lieutenant Colonel Johnson's mother until January 1980 at which time the allotment was eliminated. Thus, he should have expected an increase of \$100. However, termination of the SBP deduction of approximately \$40 also increased the amount of his retired pay. It is our view that he should have been aware that the increase was more than the amount of the allotment

which he had terminated and should have questioned the increase.

We have also held that a person is at least partially at "fault" for his failure to examine an earnings statement furnished him, which, had it been examined would have alerted the recipient to the fact that erroneous payments were being made. See, Petty Officer Richard E. Pittman, USN, B-199119, Dec. 30, 1980. Since Lieutenant Colonel Johnson's retired pay statements in 1979 clearly reflected SBP deductions, and those from 1980 to 1990 did not, it is our view that he should have been aware that the SBP deduction was not being made from his retired pay, and thus is not without "fault" in the matter, even though he was unaware of the overpayments.

With regard to his argument that the error was made by the government, we have long held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to service members would be excused from repayment.

Finally, as the Air Force has pointed out, coverage under SBP continued even though deductions from retired pay did not. Since Lieutenant Colonel Johnson had elected participation under SBP, he continued to participate in the program. Had he died during the period when deductions were not made, his records would have been reviewed and an SBP annuity would have been established for his wife. Once a member has made the election to participate in the SBP, participation is irrevocable and cannot be waived by the member. See, 10 U.S.C. § 1448.

Thus, Lieutenant Colonel Johnson's designated beneficiaries had continuous coverage under the program. Under similar circumstances, we have held that it is not against equity and good conscience to require an employee to pay for a benefit received or protection provided. See, e.g., 62 Comp. Gen. 606 (1983) and Genevieve O'Leary, B-202213, Sept. 10, 1981.

Accordingly we find that although the erroneous payments were made due to administrative error, Lieutenant Colonel Johnson is not without "fault" in the matter and therefore waiver of the debt is denied.

for *Seymour E. Hinchman*
James F. Hinchman
General Counsel